IN THE CRIMINAL COURT FOR
DAVIDSON COUNTY, TENNESSEE
DIVISION III

PAUL DENNIS REID, JR.	)	
	)	NO. 97-C-1834
	)	POST-CONVICTION
V.	)	**DEATH PENALTY CASE**
	)	
STATE OF TENNESSEE	)	*Hearing Requested*

MOTION TO RECUSE JUDGE CHERYL BLACKBURN FOR CAUSE

The Petitioner, Paul Dennis Reid, Jr., by and through counsel, Marjorie A. Bristol, Assistant Post-Conviction Defender, pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Article I, §§ 8, 9, 16, 17, and Article XI, § 8 of the Tennessee Constitution; and Tenn. Sup. Ct. R. 10, Canon 3E, hereby moves for the recusal of the Honorable Cheryl Blackburn from presiding over this case. If this Court does not grant this motion upon reviewing it, Petitioner also moves for this cause to be transferred to another judge to hold an evidentiary hearing and rule upon the instant motion.

INTRODUCTION

Tenn. Sup. Ct. R. 10, Canon 3E(1)(a) requires recusal where "the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding." Canon

3E(1)(b) requires recusal where "the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it." "Under this rule a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3E(1) apply." Tenn. Sup. Ct. R. 10, Canon 3E(1), Commentary; *see also* Judicial Ethics Committee Opinion, 03-01(attached).

Likewise, the Constitution requires recusal when a judge's impartiality might reasonably be questioned. The due process guaranteed by the Fourteenth Amendment to the United States Constitution requires judicial disqualification when necessary to avoid an appearance of impropriety. The Fourteenth Amendment's Due Process Clause guarantees the Petitioner a full and fair hearing before an impartial judge. *See Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

A judicial determination before a judge with an interest in the outcome subverts the basic tenets of due process altogether and constitutes *per se* reversible error. *See Rose v. Clark*, 478 U.S. 570, 577-579 (1986). While it is not possible to define with precision what constitutes an interest in the outcome for due process guarantee purposes, *see In re Murchison*, 349 U.S. 133, 136 (1955), the Supreme Court has characterized the test as follows: "The situation (which is

constitutionally prohibited) is one which offers 'a possible temptation to the average man as a judge ... or which might lead him not to hold the balance nice, clear and true between the State and the accused.'" *Connally v. Georgia*, 429 U.S. 245, 250 (1977), *quoting*, *Tumey v. Ohio*, *supra*, 273 U.S. at 532. *See also Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 61-62 (1972)(A defendant "is entitled to a neutral and detached judge in the first instance."); *Shadwick v. City of Tampa*, 407 U.S. 345 (1972); and *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

This test, first adopted by the court in *Tumey v. Ohio*, *supra*, reaffirms that while "[f]airness of course requires an absence of actual bias in the trial of cases[,] ... [o]ur system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, *supra*, 349 U.S. at 136. By employing this test some judges without actual bias will be disqualified. However, this cost is necessary to ensure the fairness guaranteed by the Due Process Clause. "[T]o perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt v. United States*, 348 U.S. 11, 14 [1954]." *In re Murchison*, 349 U.S. at 136.

A judge should recuse herself whenever she has any doubt as to her

ability to preside impartially in a criminal case or whenever her impartiality can reasonably be questioned. *State v. Hines*, 919 S.W.2d 573, 578 (Tenn.1995); *Alley v. State*, 882 S.W.2d 810, 820 (Tenn.Crim.App.1994): and *State v. Cash*, 867 S.W.2d 741, 749 (Tenn.Crim.App.1993).[1] Even more importantly, a judge must recuse herself not only when the judge has any doubts about his or her ability to preside impartially, but "recusal is also warranted when a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality." *Pannell v. State*, 71 S.W.2d 720, 725 (Tenn.Crim.App. 2001), *quoting*, *State v. Alley*, *supra*, 882 S.W.2d at 820 (citations omitted).

This standard does **not** reflect upon the judge's ability to act impartially but only upon whether a reasonable party could question the judge's impartiality.[2]

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[1]As courts around the country have made clear, in criminal cases, a judge should disqualify herself for cause, "if the motion has even colorable substance, a judge is well advised to disqualify [her]self and request the transfer of another judge." *State v. Tyler*, 587 S.W.2d 918, 929 (Mo.App. 1979). In the instant case, Petitioner far exceeds the standard of advancing a "colorable" claim requiring Judge Blackburn's recusal.

[2]This is true not only in Tennessee, but courts throughout the country. In Missouri for example, "the right of a defendant to disqualify the judge 'is one of the keystones of our legal administrative edifice' and our courts therefore adhere to a rule of liberal construction in favor of the right to disqualify." *State ex re. Horton v. House*, 646 S.W.2d 91, 93 (Mo. banc 1983), *quoting State ex rel. Campbell v. Kohn*, 606 S.W.2d 399, 401 (Mo.App. 1980)("When cause to recuse

The purpose of the judge disqualification rules is to protect a litigant from extrajudicial factors which would, to a reasonable person, be likely to cause bias. *United States v. Grinnell Corp.*, 384 U.S. 563, 582-83 (1966); *Lyons v. United States*, 325 F.2d 370, 376 (9th Cir. 1963), *cert. denied*, 377 U.S. 969 (1964).

The focus of the standard is upon the litigant's viewpoint because "[e]very litigant is entitled to the cold neutrality of an impartial judge and should be able to feel that his cause has been tried by a judge who is wholly free, disinterested, impartial and independent." *Wells v. Walter*, 501 S.W.2d 259, 260 (Ky.1973). *See also Leighton v. Henderson*, 220 Tenn. 91, 414 S.W.2d 419, 421 (1967); *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 859-60 (1988) ("to promote public confidence in the integrity of the judicial process," judges must not only be impartial, but reasonably be perceived to be impartial).

In *State v. Lovelady*, 691 S.W.2d 364, 365 (Mo.App. 1985), the court stated:

> The law is very jealous of the notion of an impartial arbiter. It is scarcely less important than his actual impartiality that the parties and the public have confidence in the impartiality of the arbiter. Where a judge's freedom from bias or his prejudgment of an issue

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appears a judge must do so."). Arizona courts have long recognized that the right to a trial presided over by a judge who is "impartial and free of bias or prejudice" is indispensable, the foundation on which the judicial system rests. *State v. Emanuel*, 159 Ariz. 464, 467, 768 P.2d 196, 199 (Ariz. App. 1989)(*quoting State v. Neil*, 102 Ariz. 110, 112, 425 P.2d 842, 844 (1967)).

> is called into question, the inquiry is no longer whether he is actually prejudiced; the inquiry is whether an onlooker might on the basis of objective facts reasonably question whether he was so. (emphasis supplied).

In *In re Haddad*, 128 Ariz. 490, 498, 627 P.2d 221, 229 (1981), the Arizona Supreme Court held that "[t]here is a positive obligation on the part of a judge not only to be impartial, but to be seen to be impartial[.] 'If that appearance falters, the confidence of the public will naturally wane.' *In re Franciscus*, 471 Pa. 53, 62, 369 A.2d 1190, 1195, *cert. denied* 434 U.S. 870 (1977)." *See also, Taylor v. Hayes*, 418 U.S. 488, 501 (1974)("Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties, but due process requires no less.").

In the instant case, cause exists which demands the recusal of Judge Blackburn on the grounds that she acted improperly and demonstrated bias in arriving at her previous determination of an issue at the center of these post-conviction proceedings; an appearance of impropriety and prosecutorial bias exist as a result of previous employment at the district attorneys' office and close working relationship with the prosecutor representing the state in these

proceedings, and an appearance of impropriety and actual bias has been exhibited against counsel for Petitioner.

Petitioner would note that he is making this request before he has had adequate time to fully investigate all claims that exist which would require the recusal of Judge Blackburn. He is making this motion at this juncture of the case to insure that the issues of which counsel for Petitioner is aware of at this time are not waived. *See State v. Thornton*, 10 S.W.3d 229, 237 (Tenn. 1999). Petitioner would further ask that Judge Blackburn further elucidate on the record of the proceedings any potential reasons which would warrant her recusal in this cause.

> The drafter-s commentary respecting Rule 10, Canon 3 (E) provides in pertinent part as follows:
> *A judge should disclose, on the record, information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.*

Judicial Ethics Committee Opinion 03-01(attached).

I. JUDGE BLACKBURN ACTED IMPROPERLY AND DEMONSTRATED BIAS IN HER PREVIOUS DETERMINATION OF AN ISSUE AT THE CENTER OF PETITIONER'S POST-CONVICTION PROCEEDINGS

Judge Blackburn should recuse herself, because she has previously determined an issue which is paramount to these post-conviction proceedings–the issue of Petitioner's competence– and acted inappropriately and demonstrated bias

in arriving at that determination. Judge Blackburn has previously decided this issue in the proceedings prior to the commencement of Petitioner's second murder trial before this Court (no. 97-C-1834). Prior to a hearing regarding Petitioner's competence in that case, Judge Blackburn clearly indicated her opinion that Petitioner was competent ***before*** any hearing regarding Petitioner's competence had commenced. (See trial counsel's motion to recuse from case no. 97-C-1836, attached) She indicated that she had extensive knowledge of Petitioner's background and thought that competence was not an issue in Petitioner's case. "An expression of opinion on the merits of the case prior to hearing the evidence is indicative of bias." *State v. Alley*, 882 S.W.2d at 822.

A. Judge Blackburn Acted Inappropriately And Exhibited Bias By "Expert Shopping" and Substituting Her Own "Expert" Opinion For That Of the Expert She Retained to Advise the Court.

At the hearing regarding Petitioner's competence in case number 97-C-1836, Judge Blackburn heard testimony from three doctors: two who concluded that Petitioner was not competent and one who concluded that Petitioner was competent. Significantly, one of the doctors who concluded that petitioner was not competent was the Court's own expert, Dr. Keith Caruso. In an attempt to find an expert who would agree with her, Judge Blackburn then ordered another

evaluation of Petitioner by the Department of Mental Health and Mental Retardation at Middle Tennessee Mental Health Institute (MTMHI).

This bias against finding that Petitioner was incompetent to stand trial in the face of two experts, including the one employed to act as the Court's expert, is compounded in light of the fact that Judge Blackburn herself was employed as a forensic psychological examiner at MTMHI from 1975 to 1979. During her tenure at MTMHI, Judge Blackburn was the subject of a training video used to instruct forensic examiners on conducting a competency evaluation. The video offers stark proof of Judge Blackburn's bias in favor of finding defendants competent and illustrates her lack of knowledge regarding what constitutes a professionaly acceptable competency evaluation.

B. Judge Blackburn Exhibited Further Bias in Refusing the Petitioner the Resources Needed to Confront the Court's "Substitute" Expert.

After MTMHI issued a report opining that Petitioner was competent, Judge Blackburn refused Petitioner's request for authorization for funds to have Dr. Caruso - the Court's own expert - re-evaluate Petitioner. (Trial counsel's motion to recuse filed in case no. 97-C-1836, attached) Judge Blackburn then demonstrated further bias by refusing Petitioner's request to provide Dr. Caruso with MTMHI's

report so that he could examine the findings and potentially rebut the conclusion reached by MTMHI. (Id.)

Judge Blackburn then stated from the bench that Petitioner was "clearly" competent and stated "it's not even a close issue." (**"**Judge: Reid Mentally Competent," *Knoxville News-Sentinel*, May 2, 2000, attached.) Judge Blackburn's inappropriate actions, as recited above, make it clear beyond peradventure that she was biased in her previous determination of the issue. Having previously determined the issue of Petitioner's competence lends itself to the conclusion that she will be more biased in that determination in these proceedings.

II. **JUDGE BLACKBURN'S POSITION AS A WITNESS IN THESE PROCEEDINGS RENDERS HER INCAPABLE OF SITTING AS JUDGE**

A. Judge Blackburn's Comment on Petitioner's Demeanor in the Rule 12 Makes Her a Witness In Petitioner's Post-Conviction Proceedings.

Judge Blackburn's comment on Petitioner's demeanor during his first murder trial before her (No. 97-C-1834)contained in the trial judge's report made pursuant to Tennessee Supreme Court Rule 12 make her a material witness regarding Petitioner's competence at that time and further indicate preconceived notions regarding his mental state:

> The defendant was very calm, immaculately attired with an air of confidence during the guilt phase of the trial. After the guilt determination the defendant appeared sullen and withdrawn as the

> expert witnesses described his childhood history of mental disturbance and his prior violent behavior. The defendant's behavior in the courtroom did not seem to have any effect on the jury. Their determination appeared to be made on the facts as well as his prior record.

(See Rule 12)

This is important evidence regarding the Petitioner's declining mental health that occurred during the trial. Petitioner fully intends to allege that trial counsel were ineffective for failing to raise the issue of Petitioner's competence to stand trial. The description above indicates that counsel should have been on notice at this point, if not before, that Petitioner's mental state was questionable. *Compare Wiggins v. Smith*, 123 S. Ct. 2527 (2003) (When counsel is put on notice of an issue, counsel has a duty to further investigate.) *and Drope v. Missouri*, 420 U.S. 162(1975)(Counsel has a duty to raise issues of the defendant's competence even when such issues arise in the middle of a trial.)

B. Judge Blackburn's Failure to Raise the Issue of Petitioner's Competence **Sua Sponte** *Makes Her a Witness In His Post-Conviction Proceedings.*

A judge who is a material witness to relevant facts, however, is compelled to recuse herself for fundamental fairness as guaranteed by state and federal due process clauses. *Garrison v. State*, 992 S.W.2d 898, 902 (Mo.App.1999), citing *Haynes v. State*, 937 S.W.2d 199, 202, 203-04 (Mo.banc 1996). *But see Strouth*

v. State, 755 S.W.2d. 819, 823 (Tenn. Crim. App. 1986), perm. app. denied June 22, 1987.

Further, given the description from the Rule 12 of the Petitioner cited during trial coupled with Judge Blackburn's knowledge of Petitioner's extensive history of mental illness, Judge Blackburn had a duty to raise the issue of Petitioner's competence *sua sponte*. *See State v. Haun*, 695 S.W.2d 546 (Tenn. Crim. App. 1985). Judge Blackburn's failure to do so gives rise to a separate and independent claim for relief in Petitioner's post-conviction proceedings for which she would be needed as a material witness at Petitioner's evidentiary hearing in his post-conviction proceedings.

C. Judge Blackburn Is an Essential Witness In the Development of Factual Issues at the Center of This Motion

Judge Blackburn is also a material witness whose testimony is needed with regards to this motion. As described below in more detail, Petitioner is moving for Judge Blackburn's recusal on the grounds that she and the prosecutor in this case, Tom Thurman, had a close working relationship in the past and that Mr. Thurman advocated on her behalf during her election in 1998. As described above, Judge Blackburn was previously employed as a forensic psychological examiner for MTMHI. Counsel anticipates calling Judge Blackburn as a witness to this motion

to develop a record with regard to her previous employment both in the district attorney's office where she worked with Mr. Thurman and at MTMHI where she conducted competency evaluations on behalf of the state. Both of these areas of inquiry are necessary to the proof required by this motion.

D. It Is Untenable For A Judge To Serve As A Witness and A Fact-finder In the Same Proceedings.

The irreconcilable problems inherent in a judge both testifying and presiding at a hearing were elucidated in detail in *Davis v. State,* 598 S.W.2d 582 (Mo.App. 1980). *See also,* Tennessee Supreme Court Rule 10, Tennessee Code of Judicial Conduct, Canon 2 ("A Judge Should Avoid Impropriety and the Appearance of Impropriety in the Judge's Official Activities"); Canon 3(C)(1)(d)(iii)("A Judge should recuse in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where the judge ... is to the judge's knowledge likely to be a material witness in the proceeding.") .

In *Davis,* the defendant petitioned for post-conviction relief after entering pleas of guilt to charges of robbery and kidnaping. At the hearing on the defendant's petition, the trial judge, who was a witness to the alleged infirmities in

the defendant's pleas, refused to recuse himself from that hearing. Instead, the trial judge acted in the "triune capacity" of witness, judge, and trier of fact. *Davis*, 598 S.W.2d at 584. The court of appeals reversed the judgment of the trial court, noting, "'It has long been recognized under similar circumstances that a judge cannot serve as a material witness as well as the trier of fact.'" Id. at 585 (citations omitted). *See also, Freeman v. State*, 114 Idaho 521, 757 P.2d 1240 (1988)(same). *But see Strouth, supra.*

The Supreme Court of Pennsylvania considered the issue raised by the instant case in *Municipal Publications, Inc. v. Court of Common Pleas of Philadelphia County*, 489 A.2d 1286 (Pa. 1985). In that case, the trial judge both testified and presided at a hearing on a motion to recuse him from the case. The court found that procedure to be "clearly inappropriate." *Id*. at 1289. "Where the disqualification hearing brings into question the credibility of the judge, it is obvious that the judge is not in the position to maintain the objective posture required to preside over the proceedings and to assume the role of trier of fact in that proceeding." *Id*. *See also, Coslow v. State*, 490 P.2d 1116, 1119 (Okla.Crim.App. 1971)("If a judge must be called as a witness, the cause should be assigned for hearing to another judge in order to prevent a judge from being a witness before himself."); *Hooks v. State*, 207 So.2d 459, 461-462

(Fla.Dist.Ct.App. 1968)("One of the oldest and most salutary rules governing judicial disqualification is that the Judge whose disqualification is sought ... cannot himself judge the truth of the grounds for his disqualification as, to do so, he would be sitting in judgment as to his own competency to act."); and *North Carolina Nat'l Bank v. Gillespie*, 291 N.C. 303, 310-311, 230 S.E.2d 375 (1976)("Obviously, it was not proper for this trial judge to find facts so as to rule on his own qualification to preside ..."). Accordingly, if Judge Blackburn does not grant the instant motion upon reviewing it, she must transfer Petitioner's cause to another Judge to hear the instant motion and rule upon it.

III. JUDGE BLACKBURN'S RELATIONSHIP WITH THE PROSECUTOR IN PETITIONER'S CASE AND HER REPEATED DEMONSTRATIONS OF PROSECUTORIAL BIAS REQUIRES RECUSAL

A. Judge Blackburn's Close Relationship With Mr. Thurman Creates A Conflict of Interest and An Appearance of Impropriety Which Dictates She Be Recused

Judge Blackburn, the criminal court judge presiding over the instant case, and Tom Thurman, the prosecuting attorney who is prosecuting the instant case for the state, are former associates in the Office of the District Attorney General for Davidson County. From the time of her graduation from law school in 1982 until she was appointed Judge in 1996, Judge Blackburn was a state prosecutor. During her tenure with the prosecutor's office, Judge Blackburn was not just an

ordinary Assistant District Attorney, but instead held a high level supervisory position in that office. Judge Blackburn served for a period of time as one of two Deputy District Attorney Generals. The other Deputy District Attorney General in that office, Mr. Thurman, is now the lead prosecutor in the instant case.

When an attorney for one party in a lawsuit and the trial judge for that lawsuit were associated with the same law firm prior to the judge's "designation to the bench, ... it is the better practice for the court to (disqualify) itself and maintain the appearance of impartiality." *Corradino v. Corradino*, 48 N.Y.2d 894, 400 N.E. 2d 1338, 1339 (1979). *See also, State ex rel. Wilcox v. Bird*, 179 Okla. 594, 67 P.2d 966 (1937).

B. Mr. Thurman's Invovlement In Judge Blackburn's Campaign Further Dictates That She Should Be Disqualified From Sitting on Petitioner's Case

It is undersigned counsel's understanding that Mr. Thurman was heavily involved in Judge Blackburn's election campaign in 1998. Upon information and belief, Petitioner avers that the members of the Office of the District Attorney General for Davidson County, including most notably Mr. Thurman, provided both vocal and financial support for Judge Blackburn's election campaign. This fact brings into even more serious doubt the propriety of Judge Blackburn presiding over a capital case which Mr. Thurman is prosecuting. *See Aetna Cas.*

and Sur. Co. v. Berry, 669 So.2d 56, 74 (Miss. 1996)(Recusal required where attorney representing one party was "deeply" involved in Judge's election campaign); *Barber v. Mackenzie*, 562 So.2d 755 (Fla.App. Dist. 3 1990)(recusal required where attorney for one party was involved in Judge's campaign committee); and *State ex re. Brown v. Dewell*, 131 Fla. 566, 179 So. 695 (1938)(recusal required when Judge and counsel for one party were "politically intimate").

The right to a fair and impartial tribunal is a fundamental right guaranteed by the Constitution. *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971) (per curiam). It is so fundamental, in fact, that where there is even an appearance that the court may be predisposed to ruling a particular way on an issue because of favoritism towards a participant, recusal is required. *See Knapp v. Kinsey*, 232 F.2d 458, 465-67 (6th Cir. 1956), *cert. denied*, 352 U.S. 892 (1956). *See also New York City Dev. Corp. v. Hart*, 796 F.2d 976, 980 (7th Cir. 1986); *Rice v. McKenzie*, 581 F.2d 1114, 1116 (4th Cir. 1978); *United States v. Alabama*, 828 F.2d 1531, 1540 (llth Cir. 1987), *cert. denied*, 487 U.S. 1210 (1988) (all holding that in close cases, the court should decide in favor of recusal).

For Petitioner to have a full and fair hearing on this motion, it will be necessary for the Petitioner to question both Judge Blackburn and Mr. Thurman,

on the record, about the nature of their contacts regarding both their tenure together at the Davidson County District Attorney's Office and Judge Blackburn's campaign for judge. As such, Petitioner respectfully requests an evidentiary hearing presided over by another criminal court judge. Many courts around the country have recognized that this is the better procedure in any hearing at which a judge's obligation to disqualify himself/herself from a case is at issue. *See Berry v. Berry*, 654 S.W.2d 155, 161-164 (Mo.App. 1983)(Dixon, J., concurring). Under the circumstances of the instant request for recusal, where the Judge in question is a material witness to the allegations requiring the Judge's recusal, it is imperative.

C. Judge Blackburn Has Repeatedly Demonstrated Bias in Favor Of the Prosecution

As described above, Judge Blackburn exhibited prosecutorial bias in her determination of Petitioner's competence. Judge Blackburn further exhibited prosecutorial bias by improperly drawing from her experience as a former death penalty prosecutor in presiding over Petitioner's case. Judge Blackburn has used her own experience as a death penalty proponent as the window through which she judges Petitioner's case. This fact is demonstrated in Judge Blackburn's comment on the evidence presented contained in the trial judge's report from the case at issue in these post-conviction proceedings (97-C-1834):

> The evidence presented showed that there were two victims who were shot execution style in a fast food restaurant as they prepared to open for the day. The victims were shot multiple times. The evidence revealed a well planned robbery; the defendant had visited the restaurant on the prior evening inquiring about a job. A large amount of cash was taken and the defendant then set about spending a large amount of money on a new car, etc. The defendant's fingerprints were located on one of the victim's movie rental cards which had only been used the previous evening. The proof at the sentencing hearing included the defendant's prior conviction for aggravated robbery as well as a history of violent behavior since childhood. ***The sentence was consistent with those imposed in similar cases I tried as a prosecutor.*** (emphasis added)

(Rule 12) Judge Blackburn's commentary is irrelevant but, more importantly, demonstrates her bias in favor of capital punishment and her bias against Petitioner.[3] For further instances of prosecutorial bias, see *infra* at section III.

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[3]In *Morgan v. Illinois*, 504 U.S. 719 (1992), the Court held that a capital defendant has a constitutional right to strike for cause any juror who believes that the death penalty is the only appropriate punishment for first degree murder, or who will fail to consider mitigating evidence. In *Morgan*, the Court made clear that the same standard applied to judges:

> Surely if in a particular ... case the judge ... was to announce that, to him or her, mitigating evidence is beside the point and that he or she intends to impose the death penalty without regard to the nature or extent of mitigating evidence ... that judge ... should disqualify himself or herself.

Morgan, 504 U.S. at 738-739. At this point, there is ample grounds for doubt as to whether Judge Blackburn meets the standard enunciated in *Morgan.* Petitioner is entitled to question Judge Blackburn about this issue, as well as other issues

IV. JUDGE BLACKBURN'S CONFLICT OF INTEREST WITH AND HAS DEMONSTRATED BIAS AGAINST PETITIONER'S COUNSEL

A. Judge Blackburn Has A Conflict of Interest With the Office of the Post-Conviction Defender Arising Out of Previous Allegations of Prosecutorial Misconduct Against Her.

Judge Blackburn should be recused on the grounds that a conflict of interest, or, at the very least, an appearance of impropriety and possible source of bias against the PCDO exists because the PCDO has previously alleged prosecutorial misconduct against Judge Blackburn as a result of her representing the state in the cases of Byron Black and Charles Wright, both of whom received death sentences. Mr. Wright and Mr. Black were both represented by the PCDO during their post-conviction proceedings. As a result of PCDO's representation of both Mr. Wright and Mr. Black, it became necessary to allege that the state, which was repesented at trial by Cheryl Blackburn, had acted inappropriately by withholding exculpatory evidence and making improper, inflammatory remarks during closing argument to the jury. *See Black v. State,* 1999 WL 195299 (Tenn. Crim. App.)and *Wright v. State,* 987 S.W.2d 26 (Tenn.1999).__

affecting her recusal from Petitioner's case.

B. Judge Blackburn Has Exhibited Bias Against Counsel For Petitioner.

In the instant case, Judge Blackburn has demonstrated a strong bias against counsel for Petitioner. Although the post conviction proceedings in this case are scarcely a few months old, Judge Blackburn has inappropriately disparaged and denigrated counsel, both verbally and in written orders. Judge Blackburn has belittled counsel, opining that counsel has a "troubling habit of wasting time addressing insignificant issues."[4] Order, July 24, 2003. Judge Blackburn has, also, written that "[w]ith regard to counsel's repeated assertions that she is unable

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[4]Judge Blackburn's comment here is particularly telling. Either Judge Blackburn has no knowledge of the rules of waiver and procedural bar and how the failure to raise issues in state court affect Petitioner's rights in federal habeas corpus proceedings or she **wants** Petitioner to be precluded from raising issues in federal court. Judge Blackburn's comment regarding "insignificant" issues evidences either a lack of understanding or lack of concern regarding the ever changing law regarding capital jurisprudence. *Cf. Joubert v. Hopkins*, 75 F. 3d 1232 (8th Cir. 1996) (habeas petitioner should have known that the heinous, atrocious, and cruel aggravating factor was unconstitutional and raised the issue in state court despite numerous state court findings to the contrary). *Compare Machetti v. Linahan*, 679 F.2d 236 (11th Cir. 1982), *cert. denied*, 459 U.S. 1127 (1983) (state jury selection procedure that permitted any woman who did not wish to serve on a jury to opt out merely by sending notice to the jury commissioners deprived petitioner of her right to an impartial jury trial *and Smith v. Kemp*, 715 F.2d 1459 (11th Cir.), *cert. denied*, 464 U.S. 1459 (1983) (petitioner, Marchetti's husband and co-defendant, waived right to object to jury composition by failing to assert issue at trial despite the fact that the law at the time would not have recognized such a claim). **Of course, clients whose attorneys are not diligent in raising and preserving these issues in the face of hostile courts will have little or no legal recourse for asserting their constitutional rights in the future.**

to meet the Court's deadlines, the Court notes that she could accomplish the assigned tasks more quickly if she would refrain from filing unnecessary and/or repetitious motions." *Id*. Judge Blackburn's comments evidence either an ignorance of, or insensitivity to, the daunting task faced by counsel in representing a petitioner in a capital post conviction proceeding. *See, e.g.*, American Bar Association, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases:

GUIDELINE 11.9.3 DUTIES OF POST-CONVICTION COUNSEL

> A. Post-conviction counsel should he familiar with all state and federal post-conviction remedies available to the client.
>
> B. Post-conviction counsel should interview the client, and previous counsel if possible, about the case. Counsel should consider conducting a full investigation of the case, relating to both the guilt/innocence and sentencing phases. post-conviction counsel should obtain and review a complete record of all court proceedings relevant to the case. With the consent of the client, post-conviction counsel should obtain and review all prior counsel's file(s).
>
> ***C. Post-conviction counsel should seek to present to the appropriate court or courts all arguably meritorious issues, including challenges to overly restrictive rules governing post-conviction proceedings.*** (emphasis added)

In her Order of July 24, 2003, Judge Blackburn writes, "[f]or instance, one of the issues raised by counsel in the current motion is a complaint concerning the Court's use of the term "themselves" when referring to petitioner's counsel in its

June 16 order.[5] Counsel notes that she is petitioner's only attorney and that the Court's suggestion to the contrary was improper." Judge Blackburn then writes, "What counsel fails to note is that petitioner was represented by two attorneys during the June 4 hearing, which was the subject of the June 16 order." This statement is incorrect which the Court would have known had Petitioner been afforded his right to a hearing on the matter.

Although Mr. Don Dawson, the Director of the Office of the Post Conviction Defender (PCDO), was present in the courtroom, he was ***not*** representing Petitioner. Mr. Dawson was present only to answer any questions from the about the office procedure in gathering and processing records, **not** as counsel for petitioner.[6] Including this erroneous information the Court's order was another attempt by Judge Blackburn to ridicule counsel for Petitioner and provides unambiguous grounds for Judge Blackburn's recusal.

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[5] While the Court obviously felt that this was an "insignificant" point for counsel to make, counsel felt it was absolutely necessary to protect the record in the event that she had to appeal the issue of the court not allowing sufficient time to complete an adequate investigation prior to filing an amended petition in these proceedings and further to protect the record for federal review.

[6]Mr. Dawson did not speak at the June 4th hearing, because the Court refused counsel's request to make an offer of proof.

"Prejudice against a party's attorney can be as detrimental to the interests of that party as prejudice against the party himself." *Livingston v. State*, 441 So.2d 1083, 1087 (Fla. 1983)(reversing first degree murder conviction and death sentence because Judge failed to recuse himself despite prejudice against defendant's attorney). In *Livingston*, the court explained, "(t)his is especially true in this prosecution for first degree murder in which appellant's life is at stake ..." *Id*. *See also*, *Lamendola v. Grossman*, 439 So.2d 960 (Fla.App. 3d Dist. 1983)(recusal of judge required where judge was "derogatory of attorney" and generally "antagonistic" toward attorney); *Clemens v. Bruce*, 122 Mich.App. 35, 329 N.W.2d 522 (1982)(recusal required where "serious dispute" between Judge and attorney over appointment of counsel for indigent criminal defendants lead to attorney filing complaint with Judicial Tenure Commission); and *Hulme v. Woeslagel*, 208 Kan. 385, 493 P.2d 541 (1972)("It can scarcely be denied that prejudice against a party's attorney can be as detrimental to the interest of that party as prejudice against the party himself."). Judge Blackburn's conflict of interest with and obvious bias against Petitioner's counsel require her recusal in the instant case.

IV. THE EIGHTH AMENDMENT REQUIRES THE RECUSAL OF JUDGE BLACKBURN IN THE INSTANT CASE

The necessity of this Court to be free of even an appearance of impropriety is heightened in the instant case. This is a death penalty case. "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

The United States Supreme Court has consistently recognized that, in capital cases, both the guilt and penalty determinations must be structured to assure heightened reliability. *Ford v. Wainwright*, 477 U.S. 399, 411 (1986); *Caldwell v. Mississippi*, 472 U.S. 320, 343 (1985)(O'Connor, J., concurring); *Beck v. Alabama*, 447 U.S. 625, 638 (1980); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *Gardner v. Florida*, 430 U.S. 280, 305 (1976); and *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). To ensure the requisite degree of reliability, the Court has required additional safeguards not present in non-capital cases. See *Reid v. Covert*, 354 U.S. 1, 45-46 (1957)(Frankfurter, J., concurring)("It is in capital cases especially that the balance of conflicting interests must be weighed

most heavily in favor of the procedural safeguards of the Bill of Rights."). The Honorable Cheryl Blackburn must recuse herself for cause in this capital case to ensure that the requisite degree of reliability is met in the instant case.

"In a death penalty case, the question of judicial bias is of particular importance, since the judge will be called upon to make what is literally a life-or-death decision." *Duest v. Goldstein*, 654 So.2d 1004 (Fla.Dist.Ct.App. 1995)(holding that a trial judge's assistance in securing a death sentence in a defendant's trial, while judge was employed as an assistance and supervising state attorney, required reversal). In death penalty cases, a judge must be recused where there is even an appearance of impropriety. *State v. Vickers*, 138 Ariz. 450, 675 P.2d 710 (1983).

WHEREFORE, for all the foregoing reasons, and any others that may be developed at an evidentiary hearing on this motion, Petitioner respectfully moves the Honorable Cheryl Blackburn either to recuse herself from presiding over this case or to transfer the instant motion to a Judge other than Judge Blackburn to hear and rule upon the instant motion. Alternatively, if the Judge refuses to recuse herself, the Petitioner requests the Judge to certify the question for immediate interlocutory appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy the foregoing was mailed, via U.S. Mail, postage pre-paid, and/or via facsimile followed by a copy sent via U.S. Mail postage pre-paid, delivered to Deputy District Attorney General Tom Thurman, Washington Square, Suite 500, 222 Second Avenue North, Nashville, Tennessee 37201 on this 2nd day of September, 2003.

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Marjorie A. Bristol